

<sup>1</sup> Dr. Stein opined that claimant lost the ability to perform 12 of 14 tasks based upon Dr. Barnett's task list.

since leaving respondent's employ and as a result, the law compels a wage be imputed for purposes of her work disability claim.<sup>2</sup>

### **ISSUES**

The ALJ found that the claimant failed to sustain her burden of proving personal injury by accident involving the low back in a series of injuries ending on her last day worked. He did however find that the claimant had a 5 percent impairment of function to the left shoulder and a 6 percent impairment of function to the left knee. The parties do not dispute these functional impairments. Claimant seeks review of the ALJ's decision to exclude the claimant's claim for a back injury.

The claimant maintains that she not only injured her left shoulder and left knee, but her low back as well as a result of her repetitive work activities. And although claimant concedes that she did not sustain any additional percentage of permanent partial impairment to her low back as a result of this alleged series of injuries, she nonetheless received additional restrictions which she maintains prohibited her from continuing in her position as a janitor for respondent. Thus, she is entitled to a work disability based upon an 85 percent task loss and a wage loss of at least 50 percent.

Respondent argues that the ALJ's Award should be affirmed in every respect.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The Board finds that the ALJ's Award sets out findings of fact and conclusions of law that are exceptionally detailed, accurate, and supported by the record. The Board further finds that it is not necessary to repeat those findings and conclusions in this order. Therefore, the Appeals Board adopts the ALJ's findings and conclusions as its own as if specifically set forth herein.

As noted by the ALJ, the threshold issue to be determined is whether claimant has met her burden of proving a compensable injury to her low back. Claimant concedes she has a history of back problems and that her permanent impairment has not increased as a result of her work activities. Rather, she argues that her ongoing back complaints are attributable to her repetitive work activities and the restrictions that were imposed by Dr. Richman, her primary care physician, resulted in respondent's decision to terminate her employment after it concluded it could not accommodate the restrictions.

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<sup>2</sup> *Foult v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995); *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

In addressing this issue, the ALJ concluded as follows:

. . . The court concludes that she has failed to sustain her burden of proof on this issue. The medical record establishes a long history of low back complaints, extending back to 1997. There was no vocational cause established for the 1997 complaints. An MRI identified a herniated disc at L5, S1, and a bulging disc at L4,5. Treatment was provided and [c]laimant's low back complaints did not require treatment for another eight years. When she sought treatment again in 2005, there was, again, no vocational cause established (or even suggested) for those increased complaints.

Claimant did not seek treatment for low back complaints again until September, 2006, while she was off work following hysterectomy surgery. She described to Dr. Richman a lifting incident some three weeks earlier, while she was still off work. A repeat MRI identified the exact same structural defects as were identified in 1997, a herniated disc at L5,S1 and a bulging disc at L4,5. The consensus of the medical evidence establishes that [c]laimant has suffered no increase in functional impairment related to her low back since 1997. The preponderance of the evidence establishes that any complaints [c]laimant currently exhibits [are] related to her preexisting condition, as aggravated by her non-work-related lifting incident in August of 2006.

The only evidence of aggravation in [c]laimant's low back condition is the opinion of Dr. Stein. Dr. Stein relies on [c]laimant's description of ever-increasing low back pain through her last day worked. He also undertakes to compare his 2008 restrictions with those offered by Dr. Richman, a general practitioner, from 1997, as "evidence" of an aggravation. Unfortunately, Dr. Richman, who saw [c]laimant both in 1997 and in 2006, and who has directed and overseen all of [c]laimant's low back treatment, does not believe either that [c]laimant's condition has been aggravated, or that any perceived aggravation is attributable to her work duties. Dr. Richman's opinions were shared by Dr. Do, the court-appointed neutral examiner.<sup>3</sup>

The Board has closely examined the physicians' testimony along with that offered by claimant, and concludes the ALJ's Award should be affirmed. As noted by the ALJ, there is a significant difference of opinion as to whether claimant's low back complaints are attributable to her work activities. Claimant has a history of back problems dating back to 1997.<sup>4</sup> At no point in her first period of employment with respondent did she assert that work was causing her back complaints. It appears her back symptoms flared up while she was off work for her hysterectomy in 2006. Again, claimant did not ask her employer for medical treatment or assert a claim. She sought treatment on her own with her primary

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<sup>3</sup> ALJ Award (Feb. 25, 2009) at 8.

<sup>4</sup> It is worth noting that claimant worked for respondent over two periods of time, separated by a two year period working for another employer also as a janitor. The bulk of her argument seems to ignore this separation in time and seems to suggest that her series of injuries spans the entirety of her work history for respondent encompassing both periods of time, dating back to 1991.

care physician. And that physician, Dr. Richman, has testified that he cannot say that work aggravated or accelerated her back complaints.<sup>5</sup> While he agreed, on cross examination, that it is *possible* work contributed to her back problems, in his view it was not probable.<sup>6</sup> Dr. Richman's opinions mirror that offered by Dr. Do.

Like the ALJ, the Board is not persuaded that claimant suffered a low back injury as a result of her work-related activities. Accordingly, the ALJ's Award is affirmed.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bruce E. Moore dated February 25, 2009, is affirmed in all respects.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of August 2009.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Scott J. Mann, Attorney for Claimant  
Jeffrey R. Brewer, Attorney for Respondent and its Insurance Carrier  
Bruce E. Moore, Administrative Law Judge

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<sup>5</sup> Richman Depo. at 52-54.

<sup>6</sup> *Id.* at 54.